# Rumaya Properties Sdn Bhd v Seacera Development Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)(NCvC)-556-03/2022
HAS ZANAH MEHAT, CHE MOHD RUZIMA AND SEE MEE CHUN JJCA
22 JUNE 2023

*Damages — Assessment — Appeal against assessment — Plaintiff purchased medium-cost apartment from second defendant — Construction of medium-cost apartment did not materialise — Second defendant sold land to first defendant — First defendant built high-end condominium on land — Plaintiff sued defendants for specific performance — Federal Court affirmed Court of Appeal's decision in dismissing specific performance application and allowing damages in lieu of specific performance — High Court assessed damages based on defendants' expert valuation report — High Court assessed damages based on market value of medium-cost apartment and not high-end condominium — Whether amount of damages in lieu of specific performance awarded by High Court was disproportionate — Whether assessment of damages should be based on market value of high-end condominium pursuant to plaintiff's expert valuation report — Whether effective date of assessment was the date when contract was lost — Whether liquidated ascertained damages and loss of rental were claimable — Specific Relief Act 1950 s 21(2)(b)*

Via 18 sale and purchase agreements dated 19 May 2005 ('the SPAs'), the plaintiff had purchased 18 units of medium costs apartments ('the plaintiff's MCA units') known as 'Vista Damansara' which was set to be developed by the second defendant ('D2') but due to D2's financial problem, the construction of the apartments was abandoned and the land on which the said apartments were set to be constructed was sold to the first defendant ('D1'). The first defendant then developed a different high-end condominium known as 'Boulevard Residence' on the said land and consequently, the development of 'Vista Damansara' did not materialise. Several court actions ensued between the parties including a consent order between the parties in relation to the working out of the transfer of the plaintiff's MCA units in the event that the plaintiff succeeded in securing specific performance. The matter finally came before the Federal Court which ordered damages to be assessed against D1 and D2 jointly and severally and the court further affirmed the Court of Appeal's decision ('CA's order') in dismissing the plaintiff's claim for specific performance and allowing the plaintiff's claim for damages in lieu of specific performance ('FC's order'). Pursuant to the FC's order, the plaintiff applied for assessment of damages. The plaintiff relied on the plaintiff's expert valuation report and

A argued that the assessment of damages should be based on the market value of the high-end condominium in 'Boulevard Residence' ie, the total value of RM12,822,000. The plaintiff further claimed for liquidated ascertained damages ('LAD') or alternatively loss of rental. In contrast, the defendants argued that the assessment of damages should be based on the market value of
B the medium-cost apartments in Vista Damansara, as such, the value of the plaintiff's MCA units should be based on the specifications stated in the SPAs as valued by the defendants' expert valuer and the date of the valuation should be on 11 March 2008 ie, the date of the transfer of the land from D2 to D1. The learned High Court judge ('LHCJ') accepted the defendants' expert
C valuation and further rejected the plaintiff's claim for LAD for the simple reason that the plaintiff failed to secure an order for specific performance. Aggrieved by the decision, the plaintiff filed the present appeal. The crux of the plaintiff's dissatisfaction was the amount of damages that had been awarded by the LHCJ to the plaintiff in lieu of the specific performance of the SPAs.

D

**Held**, dismissing the appeal with cost of RM20,000 to be paid by the plaintiff to D2 subject to allocator and affirming the award of damages as assessed by the High Court:

E (1) The court was of the view that the CA's order which was affirmed by the Federal Court should be the basis of the assessment of damages before the High Court. With the CA's order made a specific reference to '18 units of medium-cost apartments' which was considered to be 'the subject matter of the 18 principal agreements', the only inference that could be drawn
F was that, the CA was of the view that the damages to be assessed should be based on the value of the medium-cost apartment in Vista Damansara and not the high-end condominium in Boulevard Residence (see paras 31–32).

G (2) Based on the grounds of judgment of the FC, it was clear that the FC did consider all relevant factors in affirming the CA's decision to award damages in lieu of specific performance to the plaintiff including 'the present status of the subject matter' and 'the element of unjust enrichment'. These two elements were decisive indication in assessing the damages in lieu of specific performance. For 'the present status of the
H subject matter', it was undisputed that the development of Boulevard Residence was totally different from the development of Vista Damansara whereby the cost to develop the former was much higher than the latter. As to 'the element of unjust enrichment', it was crystal clear that the order of specific performance would unjustly enrich the
I plaintiff considering that the total purchase price of the plaintiff's MCA units was RM2,657,950 whereas the value of 18 high-end condominium was RM12,822,000. If the FC intended for the assessment to be based on the value of the high-end condominium, it would have allowed the plaintiff's appeal against the CA's order, that was to allow the specific

performance order, or the FC would specifically mention that the damages would be based on the high-end condominium units (see paras 34–37).

(3) The court was of the view that the consent order ought to be read in a purposive manner. Based on the scheme of the consent order, it was comprehensible that the parties' intention was to preserve the status quo of the plaintiff's MCA units, and to deliver and transfer the said units to the plaintiff in the event that the plaintiff succeeded in getting the specific performance order of the SPAs. However, once the CA and subsequently the FC had disallowed the specific performance order, the purpose of the consent order could not longer stand. It became academic or superseded by the apex court's decision. Therefore, the consent order was no longer enforceable in the assessment of damages since the purpose of the order was overtaken by event or in other words became obsolete. Section 21(2)(b) of the Specific Relief Act 1950 would override the consent order and in such situation, the court could deny the alleged relief by consent and fashion its own just and equitable relief. Based on the above findings, the LHCJ was correct in assessing the damages based on the value of the 18 units of medium-cost apartments in Vista Damansara pursuant to the defendants' expert valuation and not based on the value of the high-end condominium in Boulevard Residence pursuant to the plaintiff's expert valuation (see paras 38, 40–43 & 48).

(4) The assessment of damages in the present case should be as at the date when the contract was lost. Thus, the relevant date should be the date when D2 transferred the said land to D1 on 11 March 2008. The court found that there was nothing wrong with the LHCJ view that the effective date of the assessment shall be the date when the SPAs were lost because the project were never materialised, and the said land was sold to D1 before the date of delivery of vacant possession (see para 51).

(5) From the facts of the case, it was not disputed that D2 had breached the SPAs when it abandoned Vista Damansara's development and disposed of the said land to D1 on 11 March 2008. The plaintiff's claim for specific performance of the plaintiff's MCA units was refused by the CA and the said decision was later affirmed by the FC. Stemming from the decision, it was explicit that D2 no longer had the ability to deliver vacant possession of the plaintiff's MCA units to the plaintiff under the SPAs. The LHCJ was correct in his finding that actual delivery of the plaintiff's MCA units under the SPAs could never take place since the project never materialised. Therefore, the claim for LAD or loss of rental based on the plaintiff's MCA units in Vista Damansara was not claimable (see para 55).

**[Bahasa Malaysia summary**

Melalui 18 perjanjian jual beli bertarikh 19 Mei 2005 ('PJB'), plaintif telah membeli 18 unit pangsapuri kos sederhana ('unit-unit MCA plaintif') yang dikenali sebagai 'Vista Damansara' yang akan dibangunkan oleh defendan kedua ('D2') tetapi disebabkan masalah kewangan D2, pembinaan pangsapuri tersebut terbengkalai dan tanah di mana pangsapuri tersebut ditetapkan untuk dibina telah dijual kepada defendan pertama ('D1'). Defendan pertama kemudiannya membangunkan kondominium mewah yang lain yang dikenali sebagai 'Boulevard Residence' di atas tanah tersebut dan akibatnya, pembangunan 'Vista Damansara' tidak menjadi kenyataan. Beberapa tindakan mahkamah terjadi di antara pihak-pihak termasuk perintah persetujuan antara pihak-pihak berhubung dengan penyelesaian pemindahan unit-unit MCA plaintif sekiranya plaintif berjaya mendapatkan pelaksanaan spesifik. Perkara tersebut akhirnya dibawa ke Mahkamah Persekutuan yang memerintahkan ganti rugi dinilai terhadap D1 dan D2 secara bersesama dan berasingan dan mahkamah seterusnya mengesahkan keputusan Mahkamah Rayuan ('perintah MR') dalam menolak tuntutan plaintif untuk pelaksanaan spesifik dan membenarkan tuntutan plaintif untuk ganti rugi sebagai ganti pelaksanaan spesifik ('perintah MP'). Bersandarkan kepada perintah MP tersebut, plaintif memohon untuk penilaian ganti rugi. Plaintif bergantung kepada laporan penilaian pakar plaintif dan berhujah bahawa penilaian ganti rugi hendaklah berdasarkan nilai pasaran kondominium mewah di 'Boulevard Residence' iaitu nilai keseluruhan RM12,822,000. Plaintif selanjutnya menuntut ganti rugi tertentu dan ditetapkan ('LAD') atau sebagai alternatif kehilangan sewa. Sebaliknya, defendan-defendan berhujah bahawa penilaian ganti rugi hendaklah berdasarkan nilai pasaran pangsapuri kos sederhana di Vista Damansara, oleh itu, nilai unit-unit MCA plaintif hendaklah berdasarkan spesifikasi yang dinyatakan dalam PJB tersebut seperti yang dinilai oleh penilai pakar defendan-defendan dan tarikh penilaian hendaklah pada 11 Mac 2008 iaitu tarikh pemindahan tanah tersebut dari D2 ke D1. Hakim Mahkamah Tinggi yang bijaksana ('HMTB') menerima penilaian pakar defendan-defendan dan seterusnya menolak tuntutan plaintif untuk LAD atas alasan mudah bahawa plaintif gagal mendapatkan perintah untuk pelaksanaan spesifik. Terkilan dengan keputusan tersebut, plaintif memfailkan rayuan semasa. Inti pati ketidakpuasan hati plaintif adalah jumlah ganti rugi yang telah diberikan oleh HMTB kepada plaintif sebagai ganti kepada pelaksanaan spesifik PJB.

**Diputuskan**, menolak rayuan dengan kos RM20,000 dibayar oleh plaintif kepada D2 tertakluk kepada alokatur dan mengesahkan award ganti rugi yang telah dinilai oleh Mahkamah Tinggi:

(1) Mahkamah berpendapat bahawa perintah MR yang telah disahkan oleh Mahkamah Persekutuan harus menjadi asas penilaian ganti rugi di hadapan Mahkamah Tinggi. Dengan perintah MR tersebut membuat

rujukan khusus kepada '18 units of medium-cost apartments' yang dianggap sebagai 'the subject matter of the 18 principal agreements', satu-satunya inferens yang boleh dibuat ialah, MR berpandangan bahawa ganti rugi yang akan dinilai hendaklah berdasarkan nilai pangsapuri kos sederhana di Vista Damansara dan bukannya kondominium mewah di Boulevard Residence (lihat perenggan 31–32).

(2) Berdasarkan alasan penghakiman MP, adalah jelas bahawa MP telah mempertimbangkan semua faktor yang relevan dalam mengesahkan keputusan MR untuk memberikan ganti rugi sebagai ganti pelaksanaan spesifik kepada plaintif termasuk 'status semasa perkara subjek' dan 'unsur pengayaan yang tidak adil'. Kedua-dua elemen ini adalah petunjuk yang menentukan dalam menilai ganti rugi sebagai ganti pelaksanaan spesifik. Untuk 'status semasa perkara subjek', tidak dapat dipertikaikan bahawa pembangunan Boulevard Residence adalah berbeza sama sekali daripada pembangunan Vista Damansara di mana kos untuk membangunkan yang pertama adalah lebih tinggi daripada yang kedua. Mengenai 'elemen pengayaan yang tidak adil', adalah jelas bahawa perintah pelaksanaan spesifik akan memperkayakan plaintif secara tidak adil memandangkan jumlah harga pembelian unit-unit MCA plaintif ialah RM2,657,950 manakala nilai 18 kondominium mewah adalah RM12,822,000. Jika MP berhasrat agar penilaian dibuat berdasarkan nilai kondominium mewah, ia akan membenarkan rayuan plaintif terhadap perintah MR, iaitu membenarkan perintah pelaksanaan spesifik, atau MP secara khusus akan menyebut bahawa ganti rugi akan didasarkan pada unit kondominium mewah (lihat perenggan 34–37).

(3) Mahkamah berpendapat bahawa perintah persetujuan tersebut harus dibaca secara 'purposive'. Berdasarkan skema perintah persetujuan tersebut, dapat difahami bahawa niat pihak-pihak adalah untuk mengekalkan status quo unit-unit MCA plaintif, dan untuk menyerahkan dan memindahkan unit-unit tersebut kepada plaintif sekiranya plaintif berjaya mendapatkan perintah pelaksanaan spesifik PJB tersebut. Walau bagaimanapun, sebaik sahaja MR dan seterusnya MP telah tidak membenarkan perintah pelaksanaan spesifik, tujuan perintah persetujuan tersebut tidak dapat bertahan lagi. Ia menjadi akademik atau digantikan oleh keputusan mahkamah tertinggi. Oleh itu, perintah persetujuan tersebut tidak lagi boleh dikuatkuasakan dalam penilaian ganti rugi kerana tujuan perintah tersebut telah diatasi oleh peristiwa atau dengan kata lain menjadi lapuk. Seksyen 21(2)(b) Akta Relief Spesifik 1950 akan mengetepikan perintah persetujuan tersebut dan dalam keadaan sedemikian, mahkamah boleh menafikan relif secara persetujuan tersebut dan membentuk relifnya sendiri yang adil dan saksama. Berdasarkan penemuan-penemuan di atas, HMTB adalah betul dalam menilai ganti rugi berdasarkan nilai 18 unit pangsapuri kos sederhana di Vista Damansara menurut penilaian pakar

defendan-defendan dan bukan berdasarkan nilai kondominium mewah di Boulevard Residence menurut penilaian pakar plaintif (lihat perenggan 38, 40–43 & 48).

(4) Penilaian ganti rugi dalam kes ini hendaklah pada tarikh pelanggaran kontrak tersebut. Oleh itu, tarikh yang berkaitan hendaklah tarikh D2 memindahkan tanah tersebut kepada D1 pada 11 Mac 2008. Mahkamah mendapati tiada kesalahan dengan pandangan HMTB bahawa tarikh kuat kuasa penilaian ialah tarikh pelanggaran PJB tersebut kerana projek tersebut tidak pernah menjadi kenyataan, dan tanah tersebut telah dijual kepada D1 sebelum tarikh penyerahan milikan kosong (lihat perenggan 51).

(5) Daripada fakta kes, tidak dipertikaikan bahawa D2 telah melanggar PJB tersebut apabila ia tidak meneruskan pembangunan Vista Damansara dan melupuskan tanah tersebut kepada D1 pada 11 Mac 2008. Tuntutan plaintif untuk pelaksanaan spesifik unit-unit MCA plaintif telah ditolak oleh MR dan keputusan tersebut kemudiannya disahkan oleh MP. Berpunca daripada keputusan tersebut, adalah jelas bahawa D2 tidak lagi mempunyai keupayaan untuk menyerahkan milikan kosong unit-unit MCA plaintif kepada plaintif di bawah PJB tersebut. Hakim Mahkamah Tinggi yang bijaksana adalah betul dalam penemuannya bahawa penyerahan sebenar unit-unit MCA plaintif di bawah PJB tersebut tidak akan dapat dilakukan kerana projek tersebut tidak pernah menjadi kenyataan. Oleh itu, tuntutan LAD atau kehilangan sewa berdasarkan unit-unit MCA plaintif di Vista Damansara tidak boleh dituntut (lihat perenggan 55).]

**Cases referred to**

*Antara Vista Sdn Bhd v Rumaya Properties Sdn Bhd* [2017] MLJU 1964; [2017] 1 LNS 1876, CA (folld)

*Cheng Chuan Development Sdn Bhd v Ng Ah Hock* [1982] 2 MLJ 222, FC (folld)

*Flint v Lovell* [1934] All ER Rep 200, CA (refd)

*Johnson v Agnew* [1980] AC 367, HL (folld)

*Lee Tiow Kee & Anor v Ng Geok Hwa* [2017] 4 MLJ 92, CA (folld)

*Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, FC (refd)

*Tanjung Tiara Sdn Bhd v Southwind Development Sdn Bhd* [2011] 4 MLJ 593, CA (refd)

*Topaiwah v Salleh* [1968] 1 MLJ 284, FC (refd)

*Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor* [2012] MLJU 159; [2012] 5 CLJ 229, FC (refd)

**Legislation referred to**

Specific Relief Act 1950 s 21(2)(b)

**Appeal from:** *Rumaya Properties Sdn Bhd v Seacera Development Sdn Bhd & Anor* [2022] MLJU 670 (High Court, Shah Alam)

*Gurdial Singh Nijar (with Gobinath Karuppan, Abraham Au Tian Hui and Nicholas Wong Shou Jing) (Sanjay Mohan) for the appellant.*
*Justin Voon Tiam Yu (with Alvin Lai Kok Wing and Olivia Lee Xiner) (Chong, Ng & Yap) for the first respondent.*
*Justin Voon Tiam Yu (with Alvin Lai Kok Wing) (Justin Voon Chooi & Wing) for the second respondent.*

**Che Mohd Ruzima JCA:**

INTRODUCTION

**[1]** This is an appeal which emanated from an assessment of damages heard and decided by the learned High Court judge ('LHCJ') in Shah Alam High Court. In assessing the damages, the LHCJ agreed with the respondent's/defendants' expert valuation report and rejected the appellant's/plaintiff's expert valuation report. The LHCJ also dismissed the appellant's/plaintiff's claim for liquidated ascertain damages ('LAD') or alternatively, the claim for loss of rental. Dissatisfied with part of the LHCJ decision dated 23 February 2022, the appellant/plaintiff filed an appeal against part of the LHCJ's decision.

**[2]** For ease of reference, parties will be referred to as they were in the original High Court suit, that is, the plaintiff and the defendant. Individually the first defendant and second defendant will be referred to as D1 and D2 respectively, and collectively they will be referred to as the defendants.

THE SALIENT BACKGROUND FACTS

**[3]** D2 was the previous owner and developer of a piece of land known as HD(D) 174277 PT 47, Pekan Kayu Ara, Daerah Petaling, Negeri Selangor ('the said land'). The development project on the said land involved the construction of low costs and medium costs apartments known as 'Vista Damansara'.

**[4]** The plaintiff had signed 18 sale and purchase agreements ('SPAs') all dated 19 May 2005 with the D2 to buy 18 units of medium cost apartment in Vista Damansara ('the plaintiff's MCA units'). The plaintiff made full payment towards the purchase price of the plaintiff's MCA units in Vista Damansara

totalling RM2,657,950. Under the SPAs, the delivery of vacant possession of the plaintiff's MCA units was supposed to be on 18 May 2008.

**[5]** Due to the D2's financial problem, the construction of the medium cost apartment in the Vista Damansara project was abandoned.

**[6]** On 27 April 2007, more or less a year before the proposed date of delivery of vacant possession of the plaintiff's MCA units in Vista Damansara, D2 sold the said land to D1 for RM5m. Consequently, the said land was officially transferred to D1 on or about 11 March 2008. After becoming the new owner, D1 had developed a different high-end condominium project known as 'Boulevard Residence' on the said land. Therefore, the delivery of vacant possession of the plaintiff's MCA units in Vista Damansara was never materialised.

**[7]** On 11 October 2010, the plaintiff filed an action for an order of specific performance against the defendants to deliver vacant possession of the plaintiff's MCA units in Vista Damansara premised on the SPAs.

**[8]** In order to continue with the Boulevard Residence development, a consent order was entered between the plaintiff and D1 on 11 October 2011 ('the consent order'). Meanwhile, the trial proceeded between the plaintiff and D2. At the end of the trial, the High Court granted judgment to the plaintiff on 21 November 2014.

**[9]** Aggrieved by the decision of the High Court, the defendants filed two separate appeals to the Court of Appeal.

**[10]** As the High Court judgment affected D1 who did not take part in the trial, the Court of Appeal allowed D1's appeal and set aside the High Court judgment against D1 on 9 December 2016 vide Civil Appeal No B-02(NCVC)(W)–11-01 of 2015.

**[11]** Almost a year later, a different panel of the Court of Appeal also allowed D2's appeal in part on 15 December 2017 vide Civil Appeal No B-02(NCVC)(W)-13–01 of 2015. D1's appeal on liability was dismissed but D1's appeal against the order of specific performance was allowed. The Court of Appeal further ordered that, damages to be assessed in lieu of the specific performance in relation to the plaintiff's MCA units in Vista Damansara.

**[12]** Dissatisfied with the Court of Appeal decisions, all parties filed leave for appeal to Federal Court and obtained leave to appeal from the Federal Court.

**[13]** In an order dated 28 August 2019 vide Civil Appeal No 02(f)-55–07 of 2018(B), the Federal Court allowed D1's appeal in part. The Federal Court set aside para 2 of the Court of Appeal order in Civil Appeal No B-02(NCVC)(W)-13–01 of 2015 and maintained the Court of Appeal order in Civil Appeal No B-02(NCVC)(W)-11–01 of 2015.

**[14]** On the same day, the Federal Court dismissed the plaintiff's appeal vide Civil Appeal No 02(f)-54–07 of 2018(B), affirmed the Court of Appeal decision in Civil Appeal No B-02(NCVC)(W)-13–01 of 2015 and ordered damages to be assessed against D1 and D2 jointly and severally.

**[15]** The plaintiff filed the application for the assessment of damages pursuant to the order of the Federal Court.

THE DISPUTE

**[16]** In the assessment of damages proceedings, the plaintiff's claim was based on the valuation report prepared by the plaintiff's expert, that is, the market value of the high-end condominium in Boulevard Residence developed by D1 for a total value of RM12,822,000 as at 28 August 2019. The plaintiff's further claim that, the plaintiff is contractually entitled to LAD on a daily basis at the rate of 10% of the purchase price of each unit until vacant possession is given pursuant to cll 26(2) and 28(2) of the SPAs. As the plaintiff has been deprived of the enjoyment of the common facilities, the plaintiff is entitled to further LAD at the rate of 10%pa from 20% of the purchase price payable pursuant to cl 28(2) of the SPAs. In alternative, the plaintiff claimed for the loss of rental of the plaintiff's MCA units.

**[17]** In contrast, the defendants took a different stand. It was argued that the assessment of damages should be based on the market value of 18 units of medium-cost apartments in Vista Damansara and not the high-end condominium in Boulevard Residence. Therefore, the value of the plaintiff's MCA units must be based on the specifications stated in the SPAs dated 19 May 2005 as valued by the defendants' expert valuer and the date of valuation should be on 11 March 2008, that is the date of the transfer of the said land from the D2 to D1 as pleaded by the plaintiff in para 14 of the statement of claim.

THE HIGH COURT DECISION

**[18]** The LHCJ agreed with the defendants' argument. Based on the Federal Court and the Court of Appeal decision, the damages should be based on the value of 18 units of medium-cost apartments in Vista Damansara and not the high-end condominium in Boulevard Residence. Therefore, the LHCJ

accepted the defendants' expert valuation report as correct and rejected the plaintiff's expert valuation report on the ground that it was based on wrong footing. The LHCJ also rejected the plaintiff's LAD claim and the alternative rental claim for the simple reason that the plaintiff failed to secure an order for specific performance. The claim for LAD or rental is only possible if the plaintiff is entitled to the physical possession of the plaintiff's MCA units. In this case, no actual delivery of vacant possession of the plaintiff's MCA units can take place since the Vista Damansara project never materialised.

THE APPEAL

**[19]** The notice of appeal filed by the plaintiff is as follows:

> AMBIL PERHATIAN bahawa RUMAYA PROPERTIES SDN BHD Perayu yang dinamakan di atas tidak berpuas hati dengan keputusan Yang Arif Dato' Hashim Bin Hamzah yang diberikan di Mahkamah Tinggi Malaya di Shah Alam pada 23 Februari 2022, merayu kepada Mahkamah Rayuan terhadap sebahagian keputusan tersebut yang menolak tuntutan Perayu untuk ganti rugi-ganti rugi seperti berikut:-
>
> a. Ganti rugi untuk nilai 18 unit apartmen sebanyak RM12,822,000 setakat 28 August 2019;
>
> b. Ganti rugi tertentu dan ditetapkan (*liquidated ascertain damages*) sebanyak RM4,146,625 atau RM2,099,925.19 alternatifnya kerugian sewa untuk jumlah sebanyak RM7,722,000 atau RM4,257,000; dan
>
> c. Faedah terhadap amaun-amaun yang dinyatakan di perenggan-perenggan a dan b di atas pada kadar 5% setahun dari tarikh penghakiman, 21 November 2014 sehingga penyelesaian penuh.

**[20]** In the memorandum of appeal, the plaintiff listed seven main grounds of appeal which predominantly focus on the issue of the value of the plaintiff's MCA units in relation to the consent order entered between the plaintiff and D1 on 11 October 2011. Besides that, the plaintiff also raised the issue of plaintiff's claim on LAD or in the alternative the plaintiff's claim for rental of the plaintiff's MCA units.

**[21]** As to the value of the plaintiff's MCA units, learned counsel for the plaintiff argued that the consent order allowed D1 to overcome the legal impediment as the plaintiff agreed not to continue its challenge to the development of Boulevard Residence. D1 then agreed to identify 18 units from Boulevard Residence to be treated as the plaintiff's MCA units from the original SPAs between D2 and the plaintiff. D1 proceeded to develop the high-end condominium units knowing well that it would have to deliver 18 of Boulevard Residence units to the plaintiff in the event the plaintiff is successful in its claim against D2. Learned counsel for the plaintiff also stressed that the consent order specifically refers to Boulevard Residence and not Vista

Damansara. It was further argued that the consent order changed the perspective as to how the specific performance of the plaintiff's MCA units under the SPAs ought to be carried out.

**[22]** Conversely, learned counsel for the defendants submitted that the basis or substratum for the assessment of damages should be based on the Federal court order dated 28 August 2019 which ordered damages to be assessed in lieu of specific performance against the defendants. It was further submitted that the Court of Appeal decision as affirmed by the Federal Court had made it very clear that the monetary compensation to be awarded is in relation to the plaintiff's MCA units in Vista Damansara and not the high-end condominium units in Boulevard Residence.

OUR DECISION

**[23]** To begin with, the issue of liability to pay damages for breach of the SPAs related to the purchase of the plaintiff's MCA units in Vista Damansara is well settled. The relevant matters went up to the apex court and had been finally decided. The defendants were found liable for breach of contract and ordered to pay damages jointly and severally to the plaintiff. On damages, the Federal Court affirmed the Court of Appeal decision to dismiss the plaintiff's claim for specific performance but to allow the plaintiff's claim for damages in lieu of specific performance. In that circumstances, the Federal Court upholds the rationale behind the Court of Appeal's decision on the assessment of damages. We cannot revisit the matters that have been finally decided by the apex court.

**[24]** For the assessment of damages, the plaintiff filed an application before the High Court pursuant to the order of the Federal Court. In the assessment of damages proceedings, parties called their witnesses to give *viva voce* evidence. Part of the evidence came from the valuers, who were called by both parties to give their expert evidence on the value of the plaintiff's MCA units. At the end of the proceedings, the LHCJ decided on an award that should have been given to the plaintiff.

**[25]** It is a well-established principle of law that a court in assessing the quantum of damages exercises a discretionary jurisdiction and the appellate court will not disturb the finding of the trial judge. More so, in the proceeding that involved *viva voce* evidence where the trial judge had the benefit of seeing and hearing the witnesses. The exercise of the judicial discretion should not be disturbed unless there is a clear error of fact or the judge is plainly wrong on the principle of law, or the amount awarded is extremely high or very small so as to make it an entirely erroneous estimate of the damages to be awarded. See among others, Greer LJ decision in *Flint v Lovell* [1934] All ER Rep 200 at pp

202–203; Federal Court decision in *Topaiwah v Salleh* [1968] 1 MLJ 284 at p 285; this court's decision in *Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor* [2012] MLJU 159; [2012] 5 CLJ 229 at pp 235 to 237; and *Tanjung Tiara Sdn Bhd v Southwind Development Sdn Bhd* [2011] 4 MLJ 593, at pp 602–603. For 'plainly wrong' test, see Federal Court decision in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67.

**[26]** Reverting back to the appeal before us, the crux of the plaintiff's dissatisfaction is on the amount of damages that had been awarded by the LHCJ to the plaintiff in lieu of specific performance of the SPAs. Learned counsel for the plaintiff's argued that the LHCJ erred in law and fact when His Lordship decided to accept the defendants' expert evidence on the value of the plaintiff's MCA units in Vista Damansara and rejected the plaintiff's expert evidence on the value of the plaintiff's MCA units based on the high-end condominium units in Boulevard Residence.

**[27]** In his submission, learned counsel for the plaintiff argued that the LHCJ ignores an agreement between parties as to how the specific performance of the SPAs would be carried out. It is further argued that the LHCJ should apply the underlying principle of damages in lieu of specific performance in the situation that specific performance in kind pursuant to the consent order. In such situation, the LHCJ should award monetary damages that replace the agreed manner in which specific performance is to be paid notwithstanding the change in circumstances as to the development of the plaintiff's MCA units.

**[28]** Based on the said arguments, it is clear that the learned counsel for the plaintiff strongly relied on the consent order to justify the amount claimed by the plaintiff in the assessment proceeding. The plaintiff took a stand that whilst the Federal Court agreed with the Court of Appeal in refusing the relief of specific performance to the plaintiff, it is undisputed that the Federal Court did not set aside the consent order, nor did the Federal Court rule that the consent order is inapplicable for purposes of assessment. Therefore, it is wrong for the LHCJ to make a finding that the Court of Appeal's decision in allowing the assessment of damages in lieu of specific performance, which was affirmed by the Federal Court, had superseded the consent order.

**[29]** On this issue, learned counsel for the defendants took a different stand. It was argued that from a plain reading of all the paragraphs of the consent order, it clearly shows that the consent order is not about the assessment of damages. The consent order is about the working out of the transfer of the plaintiff's MCA units in the event that the plaintiff succeeded in securing a specific performance order after trial. However, the need to pass on any of the plaintiff's MCA units no longer exists after specific performance was refused.

Thus, the basis for granting the damages via the assessment proceedings must follow the directions and/or grounds of judgment of the Court of Appeal which was affirmed by the Federal Court, and not the consent order.

**[30]** To address this issue, we are of the view that there are three related contemporaneous matters that have to be considered harmoniously. First, the Court of Appeal's decision in allowing D2's appeal in part and denied the plaintiff's specific performance and instead ordered for damages to be assessed in relation to the plaintiff's MCA units. The decision can be found in *Antara Vista Sdn Bhd v Rumaya Properties Sdn Bhd* [2017] MLJU 1964; [2017] 1 LNS 1876 (*Antara Vista*'s case). For ease of reference and better understanding, we produced the relevant part of the decision as follows:

> *Should an order of specific performance be, in the circumstances, the appropriate order to be granted as a remedy?*
>
> [45] However, having established that the second defendant was liable, the next issue would be to consider whether specific performance can in the circumstances be granted as prayed for by the plaintiff in this case and which the learned High Court judge had so granted in the court below. We are with the second defendant on this issue of specific performance. Specific performance is an equitable remedy and is therefore available to an aggrieved litigant not as a matter of course as a legal relief.
>
> [46] In the cases where specific performance was granted, it was so granted to the litigant when a monetary compensation was not an adequate remedy to address the wrong suffered by the aggrieved plaintiff in the circumstances of the cases. Being an equitable remedy, it lies entirely in the hands of the court whether an order of specific performance ought to be granted to the plaintiff. In the apex court case of *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 it was held that the granting of an order of specific performance, being discretionary in nature, must be done judiciously without any caprice.
>
> [47] As a matter of law, s 21(2)(b) of the Specific Relief Act 1950 spells out how such discretion ought to be exercised if the court is not minded to issue an order of specific performance. It states:
>
> 21(1) ...
>
> (2) The following are cases in which the court may properly exercise a discretion not to decree specific performance:
>
> (a) ...
>
> (b) Where the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.
>
> [48] Before us, Mr Justin Voon, learned counsel for the second defendant submitted that in the event that the plaintiff was successful in establishing the claim for the declaration, the court ought not to order specific performance against his client (the second defendant) in respect of the said 18 properties as they are no longer in

existence, meaning to say, in the form that they were when they were purchased by the plaintiff from the second defendant. In fact, learned counsel had, in his written submissions stated as follows:

> *It is impossible and absurd — the D1 has developed the units in a DIFFERENT PROJECT which bears no resemblance to the 18 units. In fact, the P wants an unjust enrichment.*

[49] He had also cited the decided case of *Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd* [2014] 5 MLJ 491 to support his contention before us that a monetary compensation was the proper remedy to be awarded in lieu of specific performance. Having perused through the grounds of judgement of the learned High Court judge, we noted that he had not dealt with the issue of specific performance in any much detail, save that he granted the prayer for such remedy at the end of his decision. We could only venture to surmise that he had taken that approach on account of the fact that the plaintiff had succeeded in establishing its case against the second defendant.

[50] In the circumstances of this case, it was also submitted before us that the Damansara Vista apartments had since then been transformed into Boulavard Residences, a different project altogether although developed by the second defendant nevertheless. The Boulavard Residences represents a high-end condominium project, whereas the 18 apartments transacted between the parties in 2005 had been medium cost apartments. Not to mention, innocent third parties may be adversely affected through no fault of theirs, completely. We did not recall having heard any violent objections nor any coherent submissions to the contrary advanced from the plaintiff's side on this issue.

[51] As such, in line with the dictates of s 21(2)(b) of the Specific Relief Act 1950, we are of the considered view that some difficulties may befall the second defendant which it did not foresee, if an order of specific performance were to be issued against it and that whereas at the same time, its non-performance would involve no such hardship on the plaintiff.

[52] In the circumstances, we are of the considered view that it would not be a proper nor a judicious exercise of discretion, if an order of specific performance were to be granted against the second defendant. We therefore agree with the learned counsel for the second defendant that a monetary compensation would be the appropriate remedy to be awarded to the plaintiff in relation to the 18 units of medium-cost apartments that formed the subject matter of the 18 principal agreements. We order that the compensation as damages in lieu of specific performance be assessed by the same learned High Court judge accordingly.

Second, the Federal Court decision on 28 August 2019 related to three appeals filed by the parties. There are no written grounds of decision prepared by the apex court. However, the minutes of the proceedings and the broad grounds of the Federal Court are as follows:

28 Aug 2019

Part Heard

02(f)-57-07/2018(B) [dipanggil bersama 02(f)-54–07/2018(B) & 02(f)-55–07/2018(B)]

MRRS: B-02 (NCVC) (W)13–01/2015

Mahkamah Tinggi Malaya di Shah Alam Guaman Sivil No WA-22 NCVC-642-10/2016

KORAM:

Y.A.A. Tan Sri Dato' Sri Azahar bin Mohamed, Hakim Besar Malaya

Y.A.A. Datuk Seri Panglima David Wong Dak Wah, Hakim Besar Sabah & Sarawak

Y.A. Dato' Setia Haji Mohd Zawawi bin Salleh, HMP

Y.A. Tan Sri Idrus bin Harun, HMP

Y.A. Datuk Nallini Pathmanathan, HMP

Penolong Kanan Pendaftar bertugas: Puan Sakinah binti Mohamad Pauzi

Jurubahasa: Rodziah Matled

Tempoh masa: 10.00 pg–12 tgh (2 jam)

(Mahkamah rehat: 10.50–11.30)

Gopal: Hujah

Mahkamah: bagaimana dengan consent order?

Justin: If consent order entered, specific performance will take effect

Gurdial: hujah berkenaan specific performance

(Soaljawab Mahkamah dengan pihak-pihak) (Mahkamah rehat — 10.50–11.30)

(Gurdial: Bagi kes 02-54: Pohon kos RM100,000 untuk Mahkamah ini dan Mahkamah bawahan. Justin: Pohon kos RM15,000)

Next Date: N/A

MAH:

This is our unanimous decision.

For 02–57: We first deal with appeal No 57, the third appeal. Appeal by defendant 2. In this case, both the High Court and the Court of Appeal found that the plaintiff had fully paid for the 18 units and the SPA were valid for each of the 18 units. In our judgment, this finding is supported by documentary and oral evidence tender at trial. We therefore find no valid reason to disturb the concurrent findings of the courts below. We therefore dismiss the appeal with costs and we find no necessity to answer both the questions posed. We award costs of RM30,000 to plaintiff subject to allocator. Deposit if any refunded.

For 02–54: Now we come to appeal No 54, the plaintiff's appeal. In respect of this appeal, we have taken into account all the relevant factors including the present status of the subject matter, the element of unjust enrichment and the issue of clean hand in the context of equitable remedy being sought for. For these reasons, we agree with the decision of the Court of Appeal that specific performance is not a suitable remedy in the present case. We therefore award damages in favour of plaintiff but vary the order of the Court of Appeal to make both defendant 1 and 2

liable jointly and severally in damages. In the circumstances, we answer the question posed in the affirmative. We make no order as to costs.

For 02–55: Now we come to the last appeal No 55. We allow the appeal. Consequently, we set aside the order of the Court of Appeal dated 15 December 2017 and the order of the Court of Appeal dated 9 December 2016 is maintained. No order as to costs. In the circumstances, we also find no necessity to answer both the questions posed. Deposit if any refunded.

Third, the consent order that was heavily relied by the plaintiff to persuade us to allow the appeal. For ease of reference, we reproduced the consent order in full as follows:

DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA
WRIT SAMAN NO 22N PVC-5–2011
(dipindah dari Mahkamah Tinggi Kuala Lumpur
Guaman No. S-22NCvC-27-2010)
ANTARA

Rumaya Properties Sdn Bhd
No Syarikat: 336064-D) Plaintif

DAN

1. Seacera Development Sdn Bhd
(No Syarikat: 732507-d)
2. Antara Vista Sdn Bhd
(No Syarikat: 258712-A) Defendan-Defendan

DI HADAPAN YANG ARIF HAKIM
WAN APRAH BINTI DATO' PADUKA WAN IBRAHIM
PADA 11 HARIBULAN OKTOBER 2011 DALAM KAMAR

PERINTAH PERSETUJUAN
(Di antara Plaintif dan Defendan Pertama)
(Lampiran 1)

TINDAKAN INI dipanggil untuk pengurusan kes pada 11 Oktober 2011 DAN SETELAH MENDENGAR Encik Steven How Chee Hong (bersama dengan Encik Nathan Narayanasamy) peguam bagi Plaintif, Encik Sean H M Yeow (bersama dengan Encik Hoi Jack S'ng), peguam bagi pihak defendan Pertama dan Encik Gopi Seshadari (bersama dengan Cik Lian Chiew Yi), peguam bagi pihak Defendan Ke-2 MAKA ADALAH DIPERINTAHKAN SECARA PERSETUJUAN DI ANTARA PLAINTIF DAN DEFENDAN PERTAMA bahawa —

(1) Defendan Pertama hendaklah memindah kesemua hak-hak dan kepentingan-kepentingan dalam 18 unit pangsapuri yang dikenali sebagai Vista Damansara (dan kini dikenali sebagai Boulevard Residence) yang mempunyai unit No A-4–02, A-5–02, A-6–02, A-6–07, A-15–05, A-13–09, A-13–02, A-14–04, A-13–07, A-9–03, A-12–02, A-8–02,

A-10–02, A-3–05, A-2–02, A-3–09, A-3–02 dan A-15–02 (18 Unit) yang akan dibangunkan di atas sebuah tanah yang dipegang di bawah No Hak milik PN. 15980 Lot 13850 Pekan Kayu Ara, Daerah Petaling, Negeri Selangor Darul Ehsan (Hartanah) kepada Defendan ke-2 melalui Perjanjian-perjanjian Jual Beli dalam (30) hari dari hari ini dan selepas itu dipegang oleh Defendan Ke-2 sementara, antara lain, penentuan Mahkamah atas siapakah pemilik sah dan benefisial 18 Unit tersebut;

(2) Defendan Ke-2 akujanji untuk tidak berurus dalam apa jua cara pun atau melepaskan milikan 18 Unit tersebut sementara pelupusan akhir tindakan ini dan penentuan hak milik 18 Unit tersebut termasuk apa-apa rayuan dan sekiranya Defendan Pertama mempunyai pengetahuan atas perkara yang sama, Defendan Pertama juga akujanji untuk tidak memberi kebenaran kepada urusan sedemikian;

(3) Sekiranya selepas pelupusan akhir tindakan ini dan apa-apa rayuan, ia adalah ditentukan bahawa Plaintif adalah pemilik sah dan/atau benefisial 18 Unit tersebut, Defendan Ke-2 hendaklah memindah kesemua hak-hak dan kepentingan-kepentingan dalam 18 Unit tersebut kepada Plaintif atas kos dan perbelanjaan Defendan Ke-2 atau Plaintif hendaklah memasuki suatu Perjanjian Jual Beli dengan Defendan Pertama dengan pengakuan penuh Defendan Pertama dan Defendan Ke-2 bahawa harga belian telah pun dibayar secara penuh dalam tempoh masa yang ditentukan oleh Mahkamah;

(4) Defendan Pertama hendaklah berterus dengan pembangunan Hartanah tersebut termasuk 18 Unit tersebut berdasarkan pelan-pelan terpinda Defendan Pertama yang dicadangkan sepertimana yang telah diterbitkan oleh Defendan Pertama untuk projek yang dikenali sebagai Boulevard Residence tertakluk kepada saiz unit-unit tersebut bukan lebih kecil daripada apa yang dinyatakan dalam Perjanjian jual Beli asal di antara Plaintif dan Defendan Ke-2 dan kepada apa apa pindaan dan/atau variasi yang diperlukan oleh pihak-pihak berkuasa yang relevan;

(5) Walaupun terdapatnya kaveat Plaintif atas Hartanah tersebut, Plaintif hendaklah dianggap telah bersetuju kepada Defendan Pertama berurusan dengan Hartanah tersebut untuk kepentingan pembangunan tersebut asalkan Defendan Pertama tidak membebankan 18 unit tersebut;

(6) Akujanji Defendan Pertama yang diberikan pada 10 November 2010 adalah dilarutkan;

(7) Tiada Perintah terhadap kos di antara Plaintif dan Defendan Pertama.

Bertarikh 11 hari bulan Oktober 2011

**[31]** Upon analysing the above contemporaneous matters, we are of the considered view that the relevant Court of Appeal's order which was affirmed by the Federal Court should be the basis of the assessment of damages before the High Court. As to the mechanism on how to calculate the actual damages

to be paid to the plaintiff in lieu of specific performance of the plaintiff's MCA units, we are of the view that guidance laid down by the Court of Appeal in its decision in *Antara Vista*'s case at para [52] should be decisive. For ease of reference, we reproduced the said paragraph as follows:

> [52] In the circumstances, we are of the considered view that it would not be a proper nor a judicious exercise of discretion, if an order of specific performance were to be granted against the second defendant. We therefore agree with the learned counsel for the second defendant that a monetary compensation would be the appropriate remedy to be awarded to the plaintiff in relation to the 18 units of medium-cost apartments that formed the subject matter of the 18 principal agreements. We order that the compensation as damages in lieu of specific performance be assessed by the same learned High Court judge accordingly.

**[32]** Based on the said paragraph, we agree with learned counsel for the defendants' submission that the Court of Appeal had directly ruled and held that 'a monetary compensation would be the appropriate remedy to be awarded to the plaintiff in relation to the 18 units of medium-cost apartments that formed the subject matter of the 18 principal agreements'. With the specific reference to '18 units of medium-cost apartments' which is considered to be 'the subject matter of the 18 principal agreements' by the Court of Appeal in its decision, the only inference that can be drawn is that, the Court of Appeal is of the view that the damages to be assessed should be based on the value of the medium-cost apartment in Vista Damansara and not the high-end condominium in Boulevard Residence.

**[33]** Related to the same matter, it is pertinent to note that the Court of Appeal in *Antara Vista*'s case did consider the learned counsel for D2's submission on the issue of unjust enrichment and the differences between the development of Vista Damansara and Boulevard Residence before coming to the conclusion as mention in para [52] as can be seen in paras [48] and [50] of the grounds of decision. Based on those considerations, the Court of Appeal concluded that the appropriate mechanism to calculate the remedy to be awarded to the plaintiff for the plaintiff's MCA units should be based on the value of medium-cost apartments in Antara Vista that formed the subject matter of the 18 principal agreements.

**[34]** Next, we move to the Federal Court's decision in relation to the plaintiff's appeal against the Court of Appeal decision on the award of damages to be awarded to the plaintiff. The relevant excerpts from the Federal Court's broad grounds are as follows:

> Now we come to appeal No 54, the plaintiff's appeal. In respect of this appeal, we have taken into account all the relevant factors including the present status of the subject matter, the element of unjust enrichment and the issue of clean hand in the context of equitable remedy being sought for. For these reasons, we agree with the

decision of the Court of Appeal that specific performance is not a suitable remedy in the present case. We therefore award damages in favour of plaintiff but vary the order of the Court of Appeal to make both defendant 1 and 2 liable jointly and severally in damages.

From the excerpts, it is clear that the Federal Court did consider all relevant factors in affirming the Court of Appeal's decision to award damages in lieu of specific performance to the plaintiff. Among the factors considered are, 'the present status of the subject matter' and 'the element of unjust enrichment'. We are of the considered view that the two elements considered by the Federal Court are decisive indication in assessing the damages in lieu of specific performance.

**[35]** For 'the present status of the subject matter', it is undisputed that the development of Boulevard Resident is totally different from the development of Vista Damansara. Boulevard Resident is a high-end condominium and Vista Damansara is a medium-cost apartment. For sure, the cost of developing a high-end condominium is much higher than of developing a medium-cost apartment. In other words, it is not comparing apple to apple.

**[36]** As to 'the element of unjust enrichment', it is crystal clear that the order of specific performance would unjustly enrich the plaintiff. From the undisputed facts, the plaintiff paid a total sum of RM2,657,950 under the SPAs to purchase the plaintiff's MCA units. If the order for specific performance is allowed, the value of 18 high-end condominium as certified by the plaintiff's valuer is in the whopping sum of RM12,822,000, a nearly fivefold increase comparing to the transacted value. For sure, there is an element of unjust enrichment element involved, and would be a windfall to the plaintiff if it is allowed to claim for the order of specific performance.

**[37]** Based on the said considerations, the Federal Court dismissed the plaintiff's appeal and affirmed the Court of Appeal's decision on the award of damages in lieu of specific performance. Should the Federal Court wish to allow the value of the said 18 units high-end condominium of Boulevard Residence to be given to the plaintiff, it would have allowed the plaintiff's appeal against the decision of the Court of Appeal, that is to allow the specific performance order, or the Federal Court would specifically mention that the damages assessed will be based on the high-end condominium units.

**[38]** Finally, as regard to the consent order entered between the plaintiff and D1, we are of the opinion that the said consent order should be read in a purposive manner.

**[39]** From the plain reading of the first paragraph of the consent order, it shows that D1 agreed to transfer all rights and interests of the plaintiff's MCA

units to D2. In second paragraph, D2 undertake not to deal with or part possession with the plaintiff's MCA units pending the final disposal of the plaintiff's claim. In third paragraph, D2 shall transfer all rights and interests in the plaintiff's MCA units to the plaintiff in the event that the plaintiff succeeds in its claim. Then, both parties agreed that D1 shall proceeded with the development of the said land, including the plaintiff's MCA units in the Boulevard Residence project notwithstanding the plaintiff's caveat on the said land as provided in fourth and fifth paragraphs of the consent order.

**[40]** From the choice of words used in the consent order, it's obvious that D1 desires to proceed with the development of Boulevard Residence and at the same time agreed to preserve the plaintiff's right to make a claim against D2. According to the scheme of the consent order, D1 agreed to transfer the plaintiff's MCA units to D2 as a stakeholder for the plaintiff awaiting the outcome of the plaintiff's suit. Based on the said scheme, it is comprehensible that the parties' intention is to preserve the status quo of the plaintiff's MCA units, and to deliver and transfer the said units to the plaintiff in the event that the plaintiff succeeds in getting the specific performance order of the SPAs.

**[41]** Once the Court of Appeal and later the Federal Court disallowed the specific performance order to the plaintiff, we are of the view that the purpose of the consent order can no longer stand. It became academic or superseded by the apex court's decision. Therefore, the consent order is no longer enforceable in the assessment of damages since the purpose of the order is over taken by event or in other words became obsolete.

**[42]** On this matter, we agree with learned counsel for the defendants' submission that in fact and substance, the Federal Court which affirmed the Court of Appeal's position that to prevent any hardship, s 21(2)(b) of the Specific Relief Act 1950 would override the consent order entered between the plaintiff and D1. In such situation, the court can deny the alleged relief by consent in relation to the 18 units of Boulevard Residence and fashion its own just and equitable relief.

**[43]** Thus, we are of the considered view that the LHCJ is correct in his decision to assess the damages in favour of the plaintiff based on the 18 units of medium-costs apartments in Vista Damansara that formed part of the subject matter in the SPAs entered between the plaintiff and D2, and not the value of high-end condominium in Boulevard Residence which was later developed by D1.

**[44]** In relation to the assessment of damages, there are two related issues that had cropped up before the High Court. First the issue on *the valuation reports* and second, the issue on *the effective dates of valuation*.

*The valuation reports*

**[45]** The plaintiff engaged Sr Ong May May ('PW2'), a registered valuer and a director in PA International Property Consultants (KL) Sdn Bhd, to carry out a valuation of 18 units within the development of Boulevard Residence. According to PW2's expert evidence, the market value of the 18 units of Boulevard Damansara Residence is in the sum of RM12,317,000 as at 15 December 2017 or RM12,822,000 as at 28 August 2019 based on the comparison approach of valuation in determining the market value of the 18 units of the condominium within Boulevard Residence.

**[46]** Meanwhile, the defendants called Sr Anthony Chua Kian Beng ('SD2'), a registered valuer and the Executive Director of KGV International Property Consultants to give evidence on the value of the plaintiff's MCA units based on the value of a medium-cost apartment comparable to Vista Damansara. According to SD2, the value of the plaintiff's MCA units based on the comparison method as at 11 March 2008 is RM2,885,000.

**[47]** On the issue of the experts called to value the plaintiff's MCA units, both valuers took a very different stand. Evidence shows that PW2 prepared a valuation report based on the value of high-end condominium units in Boulevard Residence as at 28 August 2019, which is the date of the Federal Court decision, to value the plaintiff's MCA units as instructed by the plaintiff. No opinion was put forward on the value of a medium-cost apartment which is comparable or equivalent to Vista Damansara. Vice versa, SD2 prepared a valuation report only on the value of a medium-cost apartment which is comparable to Vista Damansara.

**[48]** As regards to this issue, we have agreed with the LHCJ's finding that the basis for the assessment of damages should be on the order of the Court of Appeal which is affirmed by the Federal Court to allow damages in lieu of specific performance to the plaintiff. We are of the considered view that the appropriate remedy to be awarded to the plaintiff in term of monetary compensation should be the value of the 18 units of medium-cost apartments that formed the subject matter of the SPAs between the plaintiff and D2, and not the value of high-end condominium in Boulevard Residence. Thus, we find that there is no error in the LHCJ's decision to accept the defendants' expert valuation on the value of the plaintiff's MCA units which is based on the value of the 18 medium-costs apartments and rejected the plaintiff's expert valuation which is based on the wrong footing to value the plaintiff's MCA units based on 18 high-end condominiums in Boulevard Residence.

*The effective dates of valuation*

**[49]** Both parties submitted on a different date to determine the effective dates of valuation in assessing the damages. Learned counsel for the plaintiff argued that the determinative date should be the date of the Federal Court's decision, that is on 28 August 2019. On that date, the Federal Court affirmed the Court of Appeal's decision to award damages in lieu of specific performance to the plaintiff. Meanwhile, learned counsel for the defendants submitted that the assessment of damages in lieu of specific performance ought to be based on the date of the breach of contract or when the cause of action begun.

**[50]** On this issue, first and foremost we would like to refer to the House of Lords' decision in *Johnson v Agnew* [1980] AC 367. At p 401, Lord Wilberforce held that:

> In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost. Support for this approach is to be found in the cases. In *Ogle v Earl Vane* (1867) LR 2 QB 275 LR 3 QB 272 the date was fixed by reference to the time when the innocent party, acting reasonably, went into the market; in *Hickman v Haynes* (1875) LR 10 CP 598 at a reasonable time after the last request of the defendants (buyers) to withhold delivery. In *Radford v De Froberville* [1977] 1 WLR 1262, where the defendant had covenanted to build a wall, damages were held measurable as at the date of the hearing rather than at the date of the defendant's breach, unless the plaintiff ought reasonably to have mitigated the breach at an earlier date.

Back to our jurisdiction, Federal Court in *Cheng Chuan Development Sdn Bhd v Ng Ah Hock* [1982] 2 MLJ 222, at p 227 held as follows:

> In our judgment to measure the respondent's loss or damage with reference to the date of the trial is not only unrealistic but also outside the ambit of the rule relating to remoteness of damages. The respondent is only entitled to a sum of money which would compensate him for the loss which naturally arose from the breach. He sustained the loss only when he was deprived of the opportunity to buy the shophouse, and this surely occurred when the appellant sold the house to a third party and not subsequently. It was only on that date that he was to have the house sold to him but it was on that date the house was sold to someone else. Thus, if he had to buy the house or another house as a substitute therefor on that date, he would have to pay $85,000. In other words, he had to find an extra $35,500 over and above the $49,500 contract price. That is the amount which could be regarded as naturally flowing from the breach by the appellant. In fact, the law on the subject is already settled in that in the case of breach of contract assessment of damages has to be made as on the date of the breach. *Engell v Fitch* (1868-1869) LR 4 QB 659, 669 and *Lee Heng & Co v C Melchers & Co* [1963] MLJ 47. As the learned trail judge correctly applied the principle counsel's submission must fail.

See also this court decision in *Lee Tiow Kee & Anor v Ng Geok Hwa* [2017] 4 MLJ 92, at pp 100 and 101.

**[51]** Guided by the principles decided in those cases, we are of the view that the assessment of damages in the present case should be as at the date when the contract is lost. Thus, the relevant date should be the date when D2 transferred the said land to D1 on 11 March 2008. We find that there is nothing wrong with the LHCJ view that the effective date of the assessment shall be the date when the SPAs were lost because the project were never materialised, and the said land was sold to D1 before the date of delivery of vacant possession.

THE PLAINTIFF'S LAD CLAIM OR ALTERNATIVELY RENTAL CLAIM

**[52]** In his grounds of judgment, the LHCJ addressed the issue of the plaintiff's LAD claim as follows:

> [41] However, I agree with the defendants that this claim should not be allowed since the plaintiff was not allowed the relief of specific performance. I agree with the defendants that the claim for LAD is only possible if the plaintiff is entitled to the physical possession of the 18 apartment units and there was a delay in delivering vacant possession. However, I am of the considered view that the issue of LAD did not arise since the land had been sold by the first defendant to the second defendant before the supposed date of delivery of vacant possession. LAD is a claim payable for late delivery which should commence from the supposed date of delivery of vacant possession until the actual delivery of vacant possession. In the present case, the actual delivery can never take place since the project never materialised.

**[53]** Learned counsel for the plaintiff submitted that the LHCJ failed to consider that damages in lieu of specific performance is awarded on the basis of compensation payable to the innocent party had the contract been performed. As such, if the SPAs had been performed, then LAD would certainly be payable. To rule otherwise would be to allow D1 and D2 to take advantage of their own wrong, that is, as a result of their breach, they need not honour the contractual terms that they have agreed to. In alternative of the LAD claim, the plaintiff is asking for loss of rental of the plaintiff's MCA units.

**[54]** On the contrary, learned counsel for the defendants argued that the plaintiff should not be allowed to claim for LAD or loss of rental in view of the fact that the plaintiff is not entitled to the relief of specific performance of the plaintiff's MCA units. As D2 is not expected to give vacant possession of the plaintiff's MCA units to the plaintiff, the question of LAD's or rental's claim for the plaintiff's MCA units does not arise at all. In other words, the claim for LAD or loss of rental is only possible if the plaintiff is entitled to the physical possession of the plaintiff's MCA unit and there is a delay in delivery of that vacant possession, which is not the case here.

**[55]** We have carefully considered the submissions on the plaintiff's claim for LAD or alternatively for loss of rental. From the facts of the case, it is not

disputed that D2 had breached the SPAs when it abandoned Vista Damansara's development and disposed of the said land to D1 on 11 March 2008. The plaintiff's claim for specific performance of the plaintiff's MCA units was refused by the Court of Appeal and the said decision was later affirmed by the Federal Court. Stemming from the decision, it is explicit that D2 no longer has the ability to deliver vacant possession of the plaintiff's MCA units to the plaintiff under the SPAs. The LHCJ was correct in his finding that actual delivery of the plaintiff's MCA units under the SPAs could never take place since the project never materialised. Therefore, the claim for LAD or loss of rental based on the plaintiff's MCA units in Vista Damansara is not claimable.

CONCLUSION

**[56]** For all the reasons adumbrated above, we find that there is no merit in the plaintiffs' appeal to warrant our appellate intervention. Accordingly, we are unanimous in dismissing this appeal with cost. We affirmed the award of damages as assessed by the High Court. The plaintiffs are hereby ordered to pay cost of RM20,000 to D2 subject to allocator.

*Appeal dismissed with cost of RM20,000 to be paid by plaintiff to D2 subject to allocator; award of damages as assessed by High Court affirmed.*

Reported by Dzulqarnain Ab Fatar